Nos. 84555-7 and 84764-9

SUPREME COURT OF THE STATE OF WASHINGTON

ATHLETIC FIELD, INC., a Washington corporation, Petitioner,

v.

TERRY L. WILLIAMS and JANIS E. WILLIAMS, husband and wife,

Respondents.

and

HOS BROS. CONSTRUCTION, INC., Appellant,

v.

C-19-1 SHOTWELL LLC; SEQUOYAH ELECTRIC, LLC, a Washington limited liability company; SS LANDSCAPING SERVICES, INC., a Washington corporation; PACLAND-BELLEVUE, INC., a Washington corporation; BANKFIRST, a South Dakota state bank; CENTURION FINANCIAL GROUP, LLC, a Washington limited liability company; WF CAPITAL, INC., a Washington limited liability company; BINGO INVESTMENTS, INC., a Washington limited liability company; and RICHARD BURRELL, an individual,

Respondents.

AMICUS CURIAE BRIEF OF WASHINGTON LAND TITLE ASSOCIATION IN SUPPORT OF LOWER COURT DECISIONS UNDER REVIEW

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I. IDENTITY AND INTEREST OF AMICUS

The Washington Land Title Association ("WLTA") is a non-profit corporation the members of which include title insurance underwriters, agents and professionals in related fields, including law. The WLTA promotes high quality land title evidencing and title insurance services.

The WLTA seeks to participate in the appellate process as *amicus curiae* when a matter is of significance to the overall stability of land titles in Washington.[1] These consolidated cases present issues of significance to the overall stability of land titles in Washington. The lower court decisions being reviewed, both of which the WLTA urges the Supreme Court to affirm, establish a sound rule of statutory construction pertaining to the effective creation of mechanic's liens that helps promote predictability and certainty in land titles and will have the effect of avoiding increases in the risks and costs associated with underwriting title insurance coverage for owners of homes and other types of real property.

[1] In the past decade, the Court has accepted *amicus* briefs from the WLTA in the cases of *Plein v. Lackey*, No. 72560-8; *Chelan County v. Nykreim*, No. 71067-8; *Barstad v. Stewart Title Ins. Co.*, No. 70268-3; *First Am. Title Ins. Co. v. Dep't of Revenue*, No. 69218-1; and *Bank of America v.* Owens, No. 84044-0. The Court also has accepted RAP 13.4(h) *amicus* memoranda in *Sound Built Homes, Inc. v. Dale Allen Land Development Co.*, No. 80375-7, and *Bank of Am. v. Owens*, No. 84044-0.

II. ARGUMENT

A. Statutes Governing the Creation and Attachment of Mechanic's Liens Are Subject to Strict, Not Liberal, Construction.

Petitioner Athletic Field and appellant Hos Bros. argue that they are entitled to "liberal" construction of RCW 60.04.091(2) and specifically to "liberal" construction of the acknowledgment requirement that the Legislature added to that statute in 1992. *Athletic Fields Pet. for Rev. at 12; Hos. Bros. Op. Br. at 14.* As respondents explain in their briefs, petitioners are incorrect. The Supreme Court reaffirmed as recently as 2009 that Washington' mechanic's lien statutes are construed and applied strictly, not liberally, for purposes of determining compliance with requirements for lien creation and attachment. *Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 498, 210 P.3d 208 (2009) (lien statutes "are strictly construed to determine whether a lien attaches").

B. The Lower Court Rulings Should be Affirmed Not Only Because They Are Consistent With RCW 60.04.091(2) as Amended in 1992, But Also Because They Further the Intended and Salutary Purpose of Establishing Clear and Uniform Requirements for Creation and Attachment of Mechanic's Liens.

1. The 1992 Legislature's addition of the requirement that a claim of lien be acknowledged "pursuant to chapter 64.08 RCW" is explicit and precludes a construction under which strict compliance with RCW 64.08.050, and either RCW 64.08.060 or RCW 64.08.070, is unnecessary.

The explicit reference in RCW 60.04.091(2) to RCW chapter 64.08 means that acknowledgment requirements applicable to conveyances apply to mechanic's lien claims. Under RCW 64.08.050:

> The officer, or person, taking an acknowledgment as in this chapter provided, ***shall*** certify the same by a certificate written upon or annexed to the instrument acknowledged and signed by him or her and sealed with his or her official seal, if any, ***and reciting in substance that the person, or persons, known to him or her as, or determined by satisfactory evidence to be, the person, or persons, whose name, or names, are signed to the instrument as executing the same, acknowledged before him or her on the date stated in the certificate that he, she, or they, executed the same freely and voluntarily***. Such certificate shall be prima facie evidence of the facts therein recited. ***The officer or person taking the acknowledgment has satisfactory evidence that a person is the person whose name is signed on the instrument if that person: (1) Is personally known to the officer or person taking the acknowledgment; (2) is identified upon the oath or affirmation of a credible witness personally known to the officer or person taking the acknowledgment; or (3) is identified on the basis of identification documents.*** [Emphases added.]

A "subscribed and sworn to before me" notarization – such as the one in the RCW 60.04.091(2) short form (which appellant Hos Bros. refers to as a "safe harbor") – has a more limited function than an acknowledgment made pursuant to the requirements of RCW chapter 64.08. The short form operates as evidence of the signor's attestation to nonfrivolousness under penalty of perjury, but falls far short of the requirements for a proper acknowledgment "pursuant to chapter 64.08 RCW," in which a notary not only attests to having seen the execution of the instrument affecting title to real property, but also certifies that he or she has confirmed the identity and authority of the person signing the instrument.

Appellant Hos Bros. argues in its reply brief at pages 7-9, that an "acknowledgment" occurs – as defined in RCW 42.44.010(4), to which RCW 60.04.091 makes no reference at all – even without the notary *certification* required by RCW chapter 64.08. But the distinction between acknowledgment and mere notarization cannot be ignored so cavalierly. The Court must construe an applicable statute – and, in these cases, RCW 64.08.050 is certainly that – in a way that gives effect to all of the statute's provisions. *Cobra Roofing v. Dept. of Labor & Indus.*, 157 Wn.2d 90, 99, 135 P.3d 913 (2006) ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous").

When a notary public takes an acknowledgment of someone signing a conveyance or instrument for a corporation, RCW 64.08.070 provides that the following language suffices:

> On this . . . . day of . . . . . ., 19. . ., before me personally appeared . . . . . ., to me known to be the (president, vice president, secretary, treasurer, or other authorized officer or agent, as the case may be) of the corporation that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

Thus, certain things need to be said and/or shown to the notary taking an acknowledgment that identify the signor to be the person he or she claims to be and to have authority to sign for a corporation. Under RCW 64.08.050, the notary must write upon the instrument (or annex to the instrument his or her certificate) that the required things were in fact uttered or proven by documentation. Both the "saying things" and the "certification that the things were said" requirements are mandatory under RCW chapter 64.08. Compliance with the acknowledgment requirement in RCW 60.04.091(2) – not just with what Hos Bros. calls the "acknowledgment" requirement but also with what Hos Bros. characterizes as a separate "certification" requirement – serves to self-authenticate or self-validate the claim of lien, and provide assurance that it

was indeed executed by someone able to show that he or she had authority to do so. That is the point of the 1992 amendment to RCW 60.04.091(2), to impose clear and uniform requirements on lien claim documents that reduce uncertainty, risk, and the cost of insuring title to real property.

2. The short form in RCW 60.04.091(2) does not provide an exemption from the more recently imposed requirement that lien claims be "acknowledged pursuant to chapter 64.08 RCW".

Contrary to a central argument proffered by Athletic Field and Hos Bros., there is no real conflict between the short form in RCW 60.04.091(2) and the explicit requirement in this same section for an acknowledgment "pursuant to chapter 64.08 RCW." Stated another way, there is no basis for construing RCW 60.04.091(2), as it has been worded since 1992, as both imposing the acknowledgment requirement and allowing that same requirement to be ignored. The short form is an example of one form that is acceptable, provided that the situation to which it is applied complies with RCW chapter 64.08. The attestation language in the short form serves to put the signor at personal risk of prosecution for perjury for filing a frivolous claim of lien, and having a notary attest to seeing the document signed guards against claims that the signature was forged.

It is the mandatory compliance with RCW chapter 64.08 that is controlling, and not the rote reproduction of a sample form, in satisfying the requirements of RCW 60.04. The acknowledgment requirement serves a different purpose entirely, which is to make a company's or corporation's claim of lien document invalid on its face if it lacks a notary's certification complying with RCW 64.08.050 and RCW 64.08.070. Stated another way, the self-authentication supplied by the acknowledgment enables the public and title insurers to rely on a recorded lien claim with much greater confidence that a lien attaches to title than is possible without an acknowledgment. Features that increase confidence in public documents affecting title to real property are desirable and reduce litigation. Where the legislature expressly requires such a feature by statute, the courts should welcome the requirement and enforce it.

Athletic Field asserted in its Petition for Review that the Court of Appeals' decision "calls into question literally every lien filed in this State that adopts the safe harbor form. . .", and that "intended beneficiaries of Washington's mechanic's lien regimen routinely use and rely on the safe harbor form. . .". *Pet. at 14.* Athletic Field cites nothing in the record to support its claim of "routine use." Yet, even if lien claims previously recorded may be subject to challenge for failure to comply with the acknowledgment requirement in RCW 60.04.091(2), such unilateral

apprehension is not a sufficient reason to refuse to enforce the law, and thereby make examination of land titles less reliable and therefore riskier and more expensive to insure.

III. CONCLUSION

For the foregoing reasons, the WLTA asks the Supreme Court to affirm the Superior Court's ruling in *Hos Bros.* and the Court of Appeals' decision in *Athletic Fields*, insofar as those decisions hold that a claim of mechanic's lien does not create a valid and enforceable claim of lien absent compliance with the requirement in RCW 60.04.091(2) that the claim be "acknowledged pursuant to chapter 64.08 RCW."

RESPECTFULLY SUBMITTED this 13 day of May, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of May, 2011, I caused a true and correct copy of the foregoing document, "Amicus Curiae Brief of Washington Land Title Association" to be delivered in the manner indicated below, to the following counsel of record:

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